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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-694

URBAIN DARDAR,
Petitioner

versus

LOUISIANA STATE DEPARTMENT OF HIGHWAYS and HOUSTON FIRE & CASUALTY INSURANCE CO.,
Defendants.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

URBAIN DARDAR

VS.

LOUISIANA STATE DEPARTMENT OF HIGHWAYS
and HOUSTON FIRE & CASUALTY INSURANCE CO.

PETITION FOR WRIT OF CERTIORARI REVIEW
THE DECISION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

The State of Louisiana, Department of Highways prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled matter on the 11th day of August, 1971 by the United States Fifth Circuit Court of Appeals, rehearing denied September 10, 1971.

CITATIONS TO OPINIONS BELOW

A judgment of the United States District Court of the Eastern District of Louisiana, New Orleans Division, No. 70-174 in favor

of Urbain Dardar allowed plaintiff to recover under admiralty jurisdiction for injuries to an employee on land, while operating a winch for a cable which extended from the Louisiana Highway on one side of a bayou to the continuation of that highway on the opposite side of the Bayou. The cable was made stationary to allow a ferry boat to glide across the Bayou from one side to the other continuing the Louisiana highway. The ferry did not operate in shipping nor did it engage in navigation. The ferry boat glided across the stationary cable in order to continue the highway traffic from one side of the bayou to the highway on the opposite side of the bayou.

The judgment of the District appearing in Appendix "A" of this writ is reported at 322 F. Supp. 1115 (1971).

The opinion of the United States Court of Appeals at New Orleans, appearing at Appendix "B", and the PER CURIAM Opinion on a petition for rehearing in said matter appearing at Appendix "D" of this writ, is not yet reported in the Federal Reporter.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 ¶1 United States Code.

QUESTIONS PRESENTED

(1) Error was committed in affirming the District Court's judgment allowing the plaintiff to recover under admirality jurisdiction, contrary to the opinion of the Fifth Circuit Court of Appeals in Cookmeyer vs. La. Dept. of Hwys. (5th Cir. 1970) 433

F. (2d) 386 and Rodrigues vs. Aetna Casualty (1969) 89 S.Ct. 1835.

(2) Error was committed in not recognizing the similarity of the issue in this case with the issue in Cookmeyer decision (Cited Supra). In both cases a Louisiana Highway continued across a body of water. In the Cookmeyer case five pontoons floated on the water connecting the highway and in this case, a ferry glided on a stationary cable from one side of the bayou to the highway on the opposite side of the bayou, but in each instance the only purpose of the pontoons or the ferry gliding across on a stationary cable was to continue the traffic of the Highway from one side of the bayou to the other.

(3) Error was committed when the Court of Appeals attempted to make a distinction, merely because in one instance five pontoons floated on the waters connecting the Louisiana Highway and, in the other instance, the continuation of the highway was a ferry boat which glided on a stationary cable from a Louisiana Highway on one side of the Bayou to a Louisiana Highway on the opposite shore, but in both instances the pontoons and the ferry were connected by means of stationary cables to the land on each side of the water.

(4) A ferry which is guided on a cable made stationary to land on each side of a bayou for the purpose of carrying vehicular traffic from the Louisiana Highway on one side of a bayou to the opposite side of the bayou is not a ship in the business of navitation but a continuation of a Louisiana Highway across a bayou, and an action in Admiralty is improper under such circumstances.

STATEMENT OF THE CASE

On February 25, 1968, the Louisiana Department of Highways operated a ferry which glided across a small bayou on a stationary cable connecting Louisiana Highway No. 45 from one side of Goose Bayou to the opposite side as a continuation of that highway. The ferry moved across the Bayou by gliding on the cable which was made stationary to the land on each side of the Bayou. The ferry operated on the stationary cable and had no other purpose than to carry the vehicular traffic of Louisiana Highway No. 45 from the Barataria side to the Lafitte side of the Bayou while a bridge in the area was under construction. The ferry did not operate in navigation and in fact was prevented from moving in navigation. The Plaintiff is an employee of the Louisiana Department of Highways. He assisted in loading and unloading the vehicles from the Highway to the Ferry and handled the winch which pulled the cable on which the ferry glided from one side of the Bayou to the other.

An action was brought by the State employee, Urbain Dardar, under the Jones Act and the General Maritime Law to recover for injuries allegedly sustained in the course of his employment with the Department of Highways in the operation of the winch which manipulated the stationary cable on which the ferry glided from the highway on one side of the bayou to the highway on the opposite side of the bayou. The ferry was placed in operation on the stationary cable to provide a means for the highway to cross Goose Bayou in the State of Louisiana while a nearby bridge was being rebuilt. The Trial Court found as a fact that the stationary cable passed through the ferry and went around two

drums, or pulleys, aboard the ferry, which allowed the ferry to move across the water by walking or traveling along the cable back and forth across the bayou, but the cable was made stationary on each side. When other vessels traveled along the bayou at that point, it was necessary for one of the workmen to release the tension on the cable by unwinding one of the winches on land so that the cable would sink to the bottom of the bayou, thus allowing the boats to pass without striking the cable. The Plaintiff's duties consisted of mooring and unmooring the ferry as it reached each side of the bayou in order to allow the automobile traffic to continue on the Louisiana Highway, maintaining the engines and operating the shore-based winches in order to raise or lower the cable on which the ferry traveled. The accident in question occurred when the plaintiff was on shore taking some slack out of the cable on which the ferry traveled. To accomplish this, it was necessary to release the brake lever on the winch to take up the slack in the cable. The crank handle suddenly whipped around and hit Plaintiff's elbow, causing the injury.

The Plaintiff, Dardar, contended that the ferry, even though it operated on a stationary cable tied to each shore, was in fact "in navigation" as defined, 1 U.S.C. §3; 46 U.S.C. §713. The State of Louisiana contended the ferry was not engaged in "navigation" but was a continuation of a Louisiana Highway as in the Cookmeyer case (cited Supra), and the purpose of the ferry boat which glided across the bayou on a permanently fixed cable was not to engage in the business of navigation or shipping; and therefore, Plaintiff could not recover in Admiralty.

The Trial Court decided there was Admiralty jurisdiction and allowed Plaintiff to recover. The Appellate Court affirmed the judgment of the Trial Court. On rehearing, the Appellate Court entered a Per Curiam judgment in which it made an alleged distinction between its Cookmeyer decision and the factual situation in this case; but, in doing so, failed to answer the crucial question, namely, Was the ferry boat which operated on a permanently attached cable and used only for the purpose of gliding across the bayou to carry the vehicular traffic from the Louisiana Highway on one side of the Bayou to the other in the business of navigation and shipping?

The question, then, before the Appellate Court was not a question of whether or not the Department of Highways was negligent, but did the factual situation allow the Trial Court to award judgment to the Plaintiff under Admiralty jurisdiction. No one denies the fact that the Plaintiff can recover in Workmen's Compensation in the State Court.

The Trial Court awarded judgment to Plaintiff in the sum of $46,424.00, which was affirmed by the Appellate Court. From the ruling in the Appellate Court in this matter, this writ is filed.

ARGUMENT

Is there such a substantial difference between the Cookmeyer facts and the facts of this case? Appendix "F", Cookmeyer sketch, shows the five pontoons which connected the Louisiana Highway in that case. Appendixes "G" and "H" are sketches of the ferry in this case. Appendixes "I", "J" and "K" are photographs of the ferry, showing the cable

attached permanently. In both cases; the purpose for the pontoons and the purpose for the ferry gliding on the stationary cable was to continue a Louisiana Highway from one side of a water to the opposite side. The ferry, like the pontoons, was not free to navigate and negotiate up and down the river, unless, of course, the permanent cable was cut loose and allowed it to go on in navigation.

Legally considered, a ferry is nothing more than the continuation of a road; and, as far as regards the authority of the State, it does not differ from a toll bridge, Gilman v. City of Phila., 70 U.S. 713. With regard to the authority of the State, a "bridge" and a "ferry" are equivalent terms. Oliff v. City of Shreveport, 27 So. 388. A ferry is a continuation of the highway from one side of the water over which it passes to the other, for transportation of passengers or of travelers with their teams and vehicles and such other properties as they may carry or have with them, and is but a substitute for a bridge where a bridge is impractical and its end and use are the same. U.S. v. Puget Sound Navigation Co. 24 F. Sup. 431. A ferry is a substitute for a bridge where a bridge is impractical, and its end and use are the same, and like a toll bridge it is created for use and convenience of the travelling public as a link in the highway system of a country. Puget Sound Co. v. U.S. 107F. (2d) 73 to hold that plaintiff in this instance can recover in admiralty where the ferry glided across the Bayou from the highway on one side to the highway on the opposite side on a permanently attached cable affixed to the land is contrary and does violence to the decision in Cookmeyer v. La. Dept. of Hwys.

(5th Cir. 1970) 433 F. (2d) 386. In the Cookmeyer case the pontoons floated on the water but were made stationary to the land on each side of the waterway and connected a Louisiana Highway. The ferry which glided across the permanently attached cable was just as much a continuation of a Louisiana Highway as was the pontoons which floated on the water in the Cookmeyer case was just as permanently affixed to the land. Both were permanently attached to the land for the sole purpose of continuing vehicular traffic from a Louisiana Highway on one side of the waterway to the opposite side and neither were in the business of navigation. If admiralty jurisdiction was not applicable in the Cookmeyer case (cited supra) it surely could not be applicable in this case.

What distinction could the Appellate Court possibly have made between five pontoon barges that floated on the water connecting the highways on one side of the waterway to the opposite side of the waterway in the Cookmeyer case and a ferry boat or car-shuttle operating on a stationary cable from a highway on one side of the bayou to the opposite of the bayou.

The United States Supreme Court in Rodrigue v. Aetna Casualty, (1969) 89 Sup. Ct. 1835 used the following pertinent language, which was applicable in the Cookmeyer case and is applicable in this case.

> "**** and these cases involve a series of events on artificial islands. Moreover, the island were not erected primarily as navigational aids, and the accident herein bore no relation to any such function. Admiralty

jurisdiction has not been construed to extend to accident on piers, jetties, bridges, or even ramps or railways, running into the sea***"

A floating dry dock was held to be a stationary fixture not used for the purpose of navigation, and therefore not considered a vessel. Cope vs. Bala Dry Docks, 22 Fed. 685; Berton vs. Tietgen Land Dry Dock Co., 218 Fed. 763.

The Supreme Court in Evansville and Bowling Green Co. vs. Chery Coco Bowling Co. (1926) 271 U.S. 19;46 Sup. Ct. 379, considered a wharf float secured to the shore by cables and used as an office or a warehouse not to be a vessel, although it floated upon the water. A floating dry dock not committed to navigation is not a vessel within the meaning of the Jones Law.

In Bernaro v. Beslim Steel Co., 200 Fed. Supp. 534, the Court said that in order for the dry dock to be a vessel to allow an action in admiralty, it must be committed to navigation on navigable waters. See also Frankel v. Bethem, 132 Fed. (2d) 634, Writ of Rev. den'd 319 U.S. 746, 63 Sup. Ct. 1030.

The Court has held that electric cables and pipelines extending from shore to shore to be an extension of land so that damages for injuries are not recoverable in admiralty and likewise an injury caused to the workman who fell from a ladder, used in ascending a barge brought into a loading dry dock for major repairs, was not cognizable in admiralty. Atkin v. Greenville Ship Building Corp., 411 Fed. (2d) 279. In the Atkin case, the dry dock floated on the water, just as

the ferry in the instant case, but was maintained by cables running to the back, just as the ferry in the instant case.

In Oregon Transfer v. Tyler, 188 F. Supp. 640, the Court stated:

> "A bridge on a road is part of the road itself, and this is without regard to the bridge's length or cost. People ex rel, Putnum v. Commissioners of Buffalo County, 4 Neb. 150; Boshears v. Foster, 154 Tenn. 494, 290 S.W. 387; Fischer v. Shaster County, 46 Cal. (2d) 771, 299 P. 2nd 222. A bridge is nothing more than that part of a road which crosses a stream. Denton v. Pulaski County, 170 Ky. 33, 185 S.W. 481; Read v. City of Camden, 54 N.J.L. 347, 373, 24A 549. 188 F. Supp. 647-649"

In the case of Rodrigue v. Aetna Casualty & Surety Co. (Sup. Ct. 1969) 89 S.Ct. 1835 while it is true that the question involved an accident on an artificial island drilling rigs located on the outer continental shelf off the Louisiana coast the Court refused to apply admiralty jurisdiction in part because men working on these islands are closely tied to the adjacent State, to which they often commute and on which their families live, unlike transitory seamen to whom a more generalized admiralty law is appropriate. The lower court in the Rodrigue case assumed that the Death on the High Sea Act did apply, since the island was located more than a marine league off the Louisiana coast, but this is not enough to make the Seas Act applicable. The Supreme Court in the Rodrigue case held that the

islands were not erected primarily as navigational aids and the accident bore no relation to any such function. The Court is quoted in part on admiralty jurisdiction comments as follows:

> "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea" (89 Sup. Ct. 1839)

In Hasting v. Mann (4th Cir. U.S. Ct. of Appeals 1965) 340 F. (2d) 910; certiorari denied by the U.S. Supreme Court April 5, 1965, 85 Sup. Ct. 1106, was an action for an accident which occurred on a boat ramp situated in navigable waters, the boat launching ramp followed the slope of the land from the point some distance above high water to a point well below water, but was secured to the bottom and was held to be an extension of the land, even though the ramp, was for a great part, under the water. The Court refused to apply admiralty jurisdiction and held that the structure to come within the Land Extension Rule must be attached to the land. And, only those vessels which are secured by temporary means are considered in admiralty. The Court in the Hasting case held that other articles placed beneath navigable waters, but affixed to the shore are not regarded as within admiralty jurisdiction. Thus, electric cables and pipelines laid on the bottom beneath navigable waters and extending to the shore have been held to be an extension of the land so that damages for injuries to them are not recoverable in admiralty.

In Cleveland Terminal & Valley R.R. Co. v. Cleveland Steamship Co. (1907) 28 Sup.

Ct. 414 the parties sought to recover under admiralty jurisdiction. A bridge owned and operated by the Cleveland Terminal & Valley Railroad Company across a river was supported by a center abutment or pier in a navigable channel and surrounding the center abutment was pilings intended to protect the vessel from damage. The docks were constructed on pilings driven in the bed of the stream and on the shore. It was floored over, but open underneath. From the case is quoted the following language:

> "***But the bridges, shore docks, protection pilings, piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such." (28 Sup. Ct. 416)

In this case, now on application for writ of review, the ferry was an aid to navigation on the land, namely a continuation of the traffic on a Louisiana highway from one side of the bayou to the Louisiana highway continuing on the opposite of the bayou. The ferry floated across the water on a cable permanently affixed to the land so that it was not in navigation or an aid in navigation but an aid in commerce upon the land or a continuation of the land, or in fact, a bridge and should not have been considered as action in admiralty.

REASONS FOR GRANTING WRIT

1) The United States Court of Appeals, Fifth Circuit, erred in affirming the decision of the Trial Court which allowed recovery under admiralty jurisdiction or a injury which occurred on land in the operation of a ferry which glided across the bayou waters on a cable which was made stationary to land continuing a Louisiana Highway from one side of the bayou to the opposite side of the bayou. Said decision of the Fifth Circuit is opposite to the decision rendered by Fifth Circuit Court of Appeals in Cookmeyer v. Dept. of Hwys. (5th Circuit 1970) 433 Fed. (2d) 386; Rodrigue vs. Aetna, (Sup. Ct. 1969) 89 Sup. Ct. 1835; Evansville & Bowling Green Co. vs. Chery Coco Bowling Co. (1926) 271 U.S. 19;46 Sup. Ct. 379

2) A writ should be granted because the decision in the above matter concluded that a ferry which glided across the water on a cable made stationary at each side of the land continuing a Louisiana highway from one side of the bayou to the Louisiana highway on the opposite side of the bayou, which had for its purpose carrying vehicular traffic from the highway on one side of the bayou to the opposite side of the bayou was not an extension of the land or a bridge or an extension of the highway to be excluded from admiralty jurisdiction.

3) The writ should be granted because the Fifth Circuit Court of Appeals held admiralty jurisdiction was not proper in the Cookmeyer decision (cited supra) which involved five pontoon bridges which floated on the water continuing a highway from one side of the waterway to the opposite side but

allow admiralty jurisdiction in this case, even though the ferry in operation glided across the water on a cable made stationary to the land on each side of the bayou having for its purpose only the carrying of vehicular traffic across the bayou.

4) A writ should be granted because the ferry which glided across the water on a cable made stationary on each side of the land to carry vehicular traffic from the highway on one side of the bayou to the opposite was an extension of the land, and a continuation of a Louisiana highway. It was held in Inhabitant of Town of Beals v. Beals 98 A. (2d) 552 that a ferry boat for passage across a body of water in order to carry passengers or freight for a reasonable toll was held to be a continuation of a highway. In City of New York v. Stain, 12 N.E. 631, a ferry was held to be a highway and a continuation of the highway from one side of the water over which it passes to the other. Legally considered, a ferry is nothing more than a continuation of a road; and, as far as regards the authority of the State, it does not differ from a toll bridge, Gilman v. The City of Phila., 70 U.S. 713; Oliff v. The City of Shreveport, 27 So. 388. A ferry is a substitute for a bridge where a bridge is impractical and its end and use are the same. U.S. v. Puget Sound Nav. Co., 24 Fed. Supp. 431; Puget Sound Nav. Co., v. U.S., 107 Fed. (2d) 73. The term "ferry" in the chapter of the statutes entitled "Ferries" presupposes a road travelled by the public which is bisected by a water course so that a ferry serves the purpose of a bridge. A ferry in its general sense is a highway over narrow waters and a continuation of a highway from one side of the water over which it passes to the other, and is for the

transportation of passengers, their teams, and vehicles and other properties. State ex rel United Rys. Co. v. Wiethaupt, 133 S.W. 329.

6) The pontoon bridge in the Cookmeyer case previously decided by the Fifth Circuit Court of Appeals (cited supra) and the car-ferry boat permanently affixed to the shores by a cable in the above case was similar in all of the following instances:

a) The pontoon bridge in the Cookmeyer case and the ferry in this case were stationary to land.

b) The pontoon bridge in the Cookmeyer case and the ferry in this case floated on the water.

c) The pontoon bridge in the Cookmeyer case and the ferry in this case carried vehicular traffic across the water connecting a Louisiana Highway.

d) The pontoon bridge in the Cookmeyer case, and the ferry in this case were operated strictly for the purpose of carrying vehicular traffic on a Louisiana highway from shore to shore.

e) The pontoon bridge in the Cookmeyer case and the ferry in connection with this case were an extension and continuation of a Louisiana highway.

C O N C L U S I O N

The ferry operated in this case on a stationary cable was only an extension of Louisiana Highway No. 45 which moved vehicular traffic from the Louisiana highway on one side of the bayou to the Louisiana highway on the opposite side of the bayou. The ferry operated on the stationary cable from shore to shore was not a vessel committed to navigation or shipping and was therefore not covered by an action in admiralty. Because of the conflict of the decision of the United States Fifth Circuit Court of Appeals in the Cookmeyer case (cited supra) with the facts in this case and other cases cited in this writ, the Court of Appeals for the Fifth Circuit was in error.

Respectfully submitted:

LOUISIANA STATE DEPARTMENT
OF HIGHWAYS

PHILIP K. JONES
NORMAN L. SISSON
BEN C. NORGRESS
JESSE S. GUILLOT

BY: _____
JESSE S. GUILLOT,
TRIAL ATTY.

PROOF OF SERVICE

STATE OF LOUISIANA:
PARISH OF ORLEANS :

BEFORE ME, the undersigned authority, personally came and appeared:

JESSE S. GUILLOT

who declared unto me, Notary, that he is an attorney for the State of Louisiana, Department of Highways, that he hereby certifies that on this date he has served a copy of the foregoing application for writ to the United States Supreme Court on Louis B. Merhige, attorney for plaintiff, Urbain Dardar by mailing same in the U.S. mail, postage prepaid to his office at 1360 Saratoga Building, 212 Loyola Avenue, New Orleans, Louisiana and to the Clerk of the Fifth Circuit Court of Appeals, Royal and Conti Streets, New Orleans, Louisiana on this, the 10th day of November, 1971, New Orleans, Louisiana.

JESSE S. GUILLOT, Trial Attorney
State of Louisiana, Department of Highways
838 Gravier Street
New Orleans, La. 70112
PHONE: 522-7296

SWORN TO AND SUBSCRIBED BEFORE ME, NOTARY, THIS, THE 10th DAY OF NOVEMBER, 1971.

s/Melvin J. Duran (SEAL)
NOTARY PUBLIC
My Commission is issued for life.

Printed Copies Mailed:

APPENDIX "A"

Urbain DARDAR, Plaintiff,

v.

STATE OF LOUISIANA, Louisiana State Dept. of Highways and the ABC Insurance Co., Defendants.

Civ. A. No. 70-174.

United States District Court,
E. D. Louisiana,
New Orleans Division.
Feb. 1, 1971.

Action by crew member of ferry boat against ferry boat owner for injuries allegedly sustained in course of his employment. The District Court, Cassibry, J., held that the injuries occurred within the course of employment, that crewman was "seaman," that employer was negligent in failing to provide safe place in which to work and with reasonably safe machinery and equipment to perform duties and that the pawl on winch was either moved out of proper position or was defective that the failure of the pawl to properly enmesh with gear teeth was proximate cause of the injury.

Judgment in accordance with opinion.

1. Navigable Waters ⇨1(7)

Evidence in ferry boat crew member's action against State for injuries

than to show a mere propensity or disposition on the part of the defendant to commit the crime. United States v. Carter, 401 F.2d 748, 749 n. 1 (C.A. 3, 1968). The evidence of the July 11 sale does not seem to fit within the exceptions.

sustained in accident relating to his duties as crewman established that Goose Bayou, Louisiana was publicly navigable and navigable in fact so that action was within admiralty and maritime jurisdiction of the district court. Jones Act, 46 U.S.C.A. § 688; 1 U.S.C.A. § 3; 46 U.S.C.A. § 713.

2. Admiralty ⇐6

Ferry boat which traveled along cable stretched across navigable bayou was "vessel" within the Jones Act and the general maritime law. Jones Act, 46 U.S.C.A. § 688; 1 U.S.C.A. § 3; 46 U.S.C.A. § 713.

See publication Words and Phrases for other judicial constructions and definitions.

3. Admiralty ⇐6

Whether particular structure is a "vessel" within the Jones Act and general maritime law depends on its nature, purpose and character; even lack of motive power does not deprive a structure of status of a vessel. Jones Act, 46 U.S.C.A. § 688; 1 U.S.C.A. § 3; 46 U.S.C.A. § 713.

4. Admiralty ⇐6

Fact that bayou ferry boat traveled along cable which was anchored to shore did not bring it into realm of bridges, piers or other structures extending above navigable waters but permanently attached to the shore or the bed of the watercourse so as to remove it from the admiralty jurisdiction of the federal courts. Jones Act, 46 U.S.C.A. § 688; 1 U.S.C.A. § 3; 46 U.S.C.A. § 713.

5. Seamen ⇐2

Plaintiff who was more or less permanently assigned by State Highway Department to ferry, performed substantially all of his work aboard the ferry and contributed to the function of the ferry and to the accomplishment of its mission was a "seaman"; fact that he did not have seaman's papers was not determinative of his status as "seaman" under Jones Act and general maritime law. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

6. Seamen ⇐2

Fact that member of ferry boat crew was paid by the hour and not provided food by his employer was not controlling as to his status as "seaman" under the Jones Act and general maritime law. Jones Act, 46 U.S.C.A. § 688.

7. Seamen ⇐29(2)

Fact that ferry boat crew member's injury occurred on land was not material and did not preclude crew member from recovery where his operation of winch, although on shore, was in course of his employment as crew member. Jones Act, 46 U.S.C.A. § 688.

8. Seamen ⇐29(1)

Recovery under Jones Act is predicated on the injury taking place in the course of employment" and exact place of injury is not controlling. Jones Act, 46 U.S.C.A. § 688.

9. Seamen ⇐29(2)

Where pawl on winch was either removed out of proper position or was defective in that it did not sufficiently engage with gear teeth to prevent winch from suddenly unwinding, State Highway Department, as owner of ferry boat, was negligent in failing to provide ferry boat crew member with safe place in which to work and with reasonably safe machinery and equipment to perform his duties. Jones Act, 46 U.S.C.A. § 688.

10. Seamen ⇐29(5.14)

Evidence established that proximate cause of ferry boat crew member's elbow injury was failure of pawl to properly enmesh with gear teeth so as to prevent winch from suddenly unwinding. Jones Act, 46 U.S.C.A. § 688.

11. Seamen ⇐29(4)

Ferry boat crew member was not contributorily negligent in failing to discover that pawl on winch was not properly enmeshed before he released the

brake lever on the winch where safe procedure required that pawl be left in place after winch was used and it appeared to be in place when he looked. Jones Act, 46 U.S.C.A. § 688.

12. Seamen ⇐29(4)
Ferry boat crew member did not assume risk of unsafe condition of defective pawl on winch. Jones Act, 46 U.S.C.A. § 688.

13. Seamen ⇐29(5.12)
Burden of proving seaman's contributory negligence by preponderance of the evidence is on the seaman's employer in action under Jones Act. Jones Act, 46 U.S.C.A. § 688.

14. Seamen ⇐29(2)
Where winch pawl was either defective or negligently left out of position for appreciable length of time, ferry boat was "unseaworthy." Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

15. Seamen ⇐29(2)
Doctrine of unseaworthiness does not apply only to equipment which is part of traditional gear of a ship nor only to equipment which is attached to or touching the ship.

16. Seamen ⇐29(2)
Shipowner has absolute duty to provide equipment which is reasonably fit for its intended use.

17. Damages ⇐186
Evidence in ferry boat crew member's action under Jones Act established that crew member was permanently disabled by injury to left elbow and was entitled to recover lost earnings for remainder of his expected work life. Jones Act, 46 U.S.C.A. § 688.

18. Damages ⇐[illegible]
Permanently disabled ferry boat crewman was entitled to recover future loss of earnings for remainder of his work life expectancy, discounted for that period of time at four per cent. Jones Act, 46 U.S.C.A. § 688.

19. Damages ⇐132(15)
Award of $20,000 for past and future pain and suffering was adequate for ferry boat crew member who was permanently disabled by injury to his left elbow. Jones Act, 46 U.S.C.A. § 688.

Louis B. Merhige, Baldwin & Merhige, William L. Crull, III, New Orleans, La., for plaintiff.

Kendall Vick, O'Keefe, O'Keefe & Fedoroff, New Orleans, La., for defendants.

CASSIBRY, District Judge:

This is an action brought by the plaintiff, Urbain Dardar, under the Jones Act and the General Maritime Law to recover for injuries allegedly sustained in the course of his employment by the defendant Louisiana Department of Highways. The matter was tried to the court on January 14, 1971 and taken under advisement. Upon consideration of the testimony adduced at trial, the stipulations made by counsel for the respective parties, and the depositions and exhibits received into evidence at trial, the court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1.

The plaintiff, Urbain Dardar, was an employee of the defendant, Louisiana Department of Highways. In November, 1967, Dardar was assigned to work aboard a ferry boat which traversed Goose Bayou near Lafitte, Louisiana. The ferry was at all material times owned, operated and controlled by the Louisiana Department of Highways. It had been placed into operation in order to provide a means of crossing Goose Bayou while a nearby bridge was being rebuilt.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1624
Summary Calendar*

URBAIN DARDAR,
Plaintiff-Appellee,

versus

LOUISIANA STATE DEPARTMENT OF HIGHWAYS and HOUSTON FIRE & CASUALTY INSURANCE CO.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(August 11, 1971)

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: Appealing from an adverse judgment below in an action tried without a jury under the Jones Act, Title 46, U.S.C., Section 688, and under general maritime law, holding them responsible in damages to the extent of $46,424.00 for negligence and for

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*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

unseaworthiness of a car-ferry boat operated temporarily[1] across Goose Bayou, near LaFitte, Louisiana, for injuries received February 25, 1968, by the plaintiff-appellee, Dardar, asserted to be serving as a seaman aboard said ferry, the appellants, Louisiana State Department of Highways and its liability insurer, Houston Fire and Casualty Insurance Company attack the judgment appealed from by three claims of asserted error:

(1) whether the car-shuttle ferry, permanently anchored as it was to the bayou bank, was in navigation, and hence within the court's admiralty jurisdiction, which we are urged to answer "No";

(2) whether the appellee was a seaman and as such entitled to maintenance and cure, which we are likewise urged to answer "No"; and

(3) whether the trial court erroneously found the Department of Highways negligent and the appellee not contributorily negligent with his negligence being the sole proximate cause of the accident and injury, which it is asserted, we should answer "Yes".

As to the third point raised, and further as to the questions of fact inhering in the first and second points raised, the appellants have, in our judgment, failed to demonstrate that the trial judge's findings of fact are clearly erroneous. F.R.Civ.P., Rule 52(a); *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20.

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[1]During repairs to a nearby bridge.

work or activity which would require strenuous exertion of the left arm.

16.

Dr. Byron Unkauf, also an orthopedic surgeon, examined plaintiff on one occasion, about a week before trial. He found a ten degree deficiency in rotation of the left elbow, as well as a slight loss of flexion of the second and third fingers of the left hand. Dr. Unkauf also found a one inch atrophy in the left arm, and a two-inch surgical scar. X-rays revealed small fragments in the area of the ulna fracture. There was also some fragmentation of the articular cartilage of the humeral condyle. Dr. Unkauf believed plaintiff had sustained damage to the medial epicondyle, together with a mild ulnar nerve neuritis. He estimated that plaintiff had a twenty-five to thirty-five per cent permanent disability of the left elbow, together with some limitation of rotation of the left forearm. He further testified that plaintiff's condition was not likely to either improve or worsen with time. Dr. Unkauf said plaintiff would experience difficulty and pain in performing manual labor, and would not be able to perform such work satisfactorily.

17.

At the time of the accident plaintiff, Urbain Dardar, was 58 years of age. He has had no formal education or training, and cannot read or write except to sign his name. He has no special skills and before his assignment to the Goose Bayou ferry, worked as a utility laborer for the Department of Highways, primarily cleaning ditches.

18.

At the time of the accident, plaintiff was earning approximately $4,560 per year. He had a work life expectancy of slightly more than six years at the time of the accident. Due to accumulated sick benefits and annual leave, plaintiff was paid his full salary until September 3, 1968. All his medical expenses have been paid. The parties have also stipulated that plaintiff has received $2,835 in compensation; which must be credited against any amount plaintiff may recover in this suit.

CONCLUSIONS OF LAW

1.

[1] This matter lies within the admiralty and maritime jurisdiction of the court. "The test of admiralty jurisdiction is the public navigable character of the water, including navigability in fact, no matter how the water originates." Norris, The Law of Seamen (3d Ed. 1962), § 24 at p. 29. "Briefly, the admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject-matter of the suit is confined to one state." Gilmore and Black, The Law of Admiralty (1957), § 1-11 at pp. 28-29. See: The Genesee Chief, 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851); The Daniel Ball, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1871); United States v. Appalachian Electric Power Co., 311 U. S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940). Goose Bayou is publicly navigable and navigable in fact.

2.

[2, 3] The Goose Bayou ferry boat was a vessel in navigation as that term is used under the Jones Act and the General Maritime Law. For purposes of admiralty jurisdiction, Congress has defined a "vessel" as "* * * every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. 46 U.S.C. § 713 defines "vessel" as "every description of vessel navigating on any sea or channel, lake or river * * *." Benedict states that "* * * all are vessels that are manned by a master and crew and are devoted to the purposes of transportation and commerce * * *." Benedict On Admiralty, Vol. I, § 53 at p.

111. "[T]he term 'vessel' is applied to floating structures capable of transporting something over water." Gilmore and Black, The Law of Admiralty (1957), § 1-11 at p. 30; cf. Bleason v. Gulfport Shipbuilding Corp., 221 F.2d 621 (5th Cir. 1955). Whether a particular structure is a vessel turns on its "nature, purpose and character". Atkins v. Greenville Shipbuilding Corp., 411 F.2d 279 (5th Cir. 1969). Even lack of motive power does not deprive a structure of the status of a vessel. Miami River Boat Yard, Inc. v. 60' Houseboat, 390 F.2d 596 (5th Cir. 1968).

In this case, the Goose Bayou ferry floated on water, was intended and actually used to transport people and automobiles over water, and was actively engaged as a vessel in navigation upon navigable waters, rather than as an extension of land.

[4] The fact that the ferry traveled along a cable which was anchored to shore does not bring it into the realm of "bridges, piers or other structures extending above navigable waters but permanently attached to the shore or the bed of the watercourse [and therefore] not within the admiralty jurisdiction of the federal courts." Evans v. Louisiana Department of Highways, 430 F.2d 1280 (5th Cir. 1970). Cf. Cookmeyer v. Louisiana Department of Highways, 309 F. Supp. 881 (E.D.La.1970), aff'd 433 F.2d 386 (5th Cir. 1970).

3.

[5, 6] The plaintiff, Urbain Dardar, was a seaman or member of the crew of the Goose Bayou ferry since he was more or less permanently assigned to the ferry, performed substantially all of his work aboard the ferry, and contributed to the function of the ferry and to the accomplishment of its mission. Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959); Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 526-527 (5th Cir. 1960); Stanley v. Guy Scroggins Construction Co., 297 F.2d 374 (5th Cir. 1961); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966); Marine Drilling Co. v. Autin, 363 F.2d 579 (5th Cir. 1966); Noble Drilling Corp. v. Smith, 412 F.2d 952 (5th Cir. 1969); Richardson v. St. Charles-St. John Baptist Bridge & Ferry Authority, 294 F.Supp. 709 (E.D.La. 1968); cf. Senko v. La Crosse Dredging Corp., 352 U.S. 370, 77 S.Ct. 415, 1 L. Ed.2d 404 (1957). The fact that plaintiff did not have seaman's papers is not determinative of his status as a seaman under the Jones Act and General Maritime Law. Offshore Company v. Robison, *supra*. Nor is the fact that he was paid by the hour and not provided found by his employer controlling as to seaman status. Richardson v. St. Charles-St. John Baptist Bridge & Ferry Authority, *supra*. Plaintiff had been working regularly on the ferry for more than three months at the time of the accident. His duties directly contributed to the mission or purpose of the ferry, i.e., transportation of people and automobiles across Goose Bayou. Except when he was operating the shore-based winch, plaintiff performed all of his duties aboard the ferry.

[7, 8] Moreover, "[t]he fact that [Dardar's] injury occurred on land is not material." Senko v. La Crosse Dredging Corp., 352 U.S. 370, 373, 77 S. Ct. 415, 417 (1957). Recovery under the Jones Act is predicated on the injury taking place "in the course of employment", and the exact place of the injury is not controlling. Crafton v. Tennessee Valley Sand & Gravel Co., 408 F.2d 1096 (5th Cir. 1969) and cases cited therein. Plaintiff's operation of the winch, although on shore, was clearly "in the course of his employment" as a member of the crew of the Goose Bayou ferry.

4.

[9, 10] The defendant, Louisiana Department of Highways, was negligent in failing to provide plaintiff with a safe place in which to work and with reasonably safe machinery and equipment to perform his duties. The evidence shows that the pawl or "safety dog" on the winch was either moved out of proper

position or was defective in that it did not sufficiently engage with the gear teeth to prevent the winch from suddenly unwinding. At least two other men had been injured in a similar manner while operating one of the winches. The failure of the pawl to properly enmesh with the gear teeth was the proximate cause of plaintiff's injury.

5.

[11-13] Under the circumstances, plaintiff was not contributorily negligent in failing to discover that the pawl or "dog" was not properly enmeshed before he released the brake lever on the winch. Safe procedure required that the pawl be left in place after the winch was used. Plaintiff testified that he looked at the pawl before releasing the brake, and it appeared to be in place. He cannot be held to have assumed the risk of the unsafe condition. The burden of proving contributory negligence by a preponderance of the evidence was on the defendant, and it has not sustained that burden.

6.

[14-16] Alternatively, the court concludes that the Goose Bayou ferry was unseaworthy because the winch pawl or "safety dog" was either defective or negligently left out of position for an appreciable length of time. The Fifth Circuit has "specifically rejected the arguments (1) that the doctrine of unseaworthiness applies only to equipment which is part of the traditional gear of a ship and (2) that the doctrine applies only to equipment which is attached to or touching the ship." Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970), citing Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir. 1966); cf. Chagois v. Lykes Bros. Steamship Co., Inc., 462 F.2d 388 (5th Cir. 1970). These cases involve longshoremen injured by shore-based equipment while loading or unloading a vessel. The winch which injured Dardar played a vital part in the navigation and movement of the ferry. It was as much an appurtenance or appliance of the ferry as was the forklift machine in *Law, supra*. Certainly if longshoremen (*Sieracki* seamen) are entitled to the warranty of seaworthiness while loading or unloading a vessel, then a Jones Act seaman such as Dardar should likewise be afforded the benefit of the doctrine in this case, even though the injury occurred on shore and the equipment which caused the injury was fixed to shore and had never been physically attached to or touching the vessel. The winch pawl was either defective or negligently left out of proper position and, in either case, an unseaworthy condition was created which proximately caused plaintiff's injuries. The shipowner has an absolute duty to provide equipment which is reasonably fit for its intended use. Mahnich v. Southern Steamship Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944); Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 2d 941 (1960); cf. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The Department of Highways has failed to fulfill that duty in this case.

7.

[17] Plaintiff is, for all practical purposes, unemployable. Both orthopedists who testified were of the opinion that plaintiff had a significant permanent disability in his left arm and is unable to satisfactorily perform the only kind of work for which he is qualified, i. e., manual labor. He has no formal education or training and has no special skills. Moreover, in view of his age it is unlikely plaintiff could successfully learn a trade or skill. I conclude that plaintiff is permanently disabled and entitled to recover lost earnings for the remainder of his expected work life.

Plaintiff was paid his full salary by the Department of Highways until September 3, 1968. He was earning $4,560 per year at the time of the accident and is entitled to recover past loss of wages to the time of trial. Accordingly, I will

award the sum of $10,830 as past loss of wages.

[18] The parties have agreed that plaintiff's work life expectancy would extend to age 65, or approximately three and one-third years from the time of trial. Discounting plaintiff's annual salary for that period of time at four per cent, I conclude that the amount of $14,085 is fair recompense for future loss of earnings.

8.

In addition to loss of earnings, plaintiff is also entitled to maintenance at the rate of $8 per day from the date of the accident to the date he reached maximum cure. Dr. Winters testified the plaintiff was discharged from treatment and his condition had become static, on September 5, 1969, some 558 days after the accident. Subtracting the 15 days plaintiff was hospitalized, I find that maintenance is due for 543 days at $8 per day, a total of $4,344. The parties have stipulated that defendants are entitled to a credit of $2,835 for compensation paid to plaintiff.

9.

[19] As the final item of damages, I hold that the sum of $20,000 will fairly and adequately compensate plaintiff for his past and future pain and suffering.

Since the award of interest in admiralty cases is within the discretion of the court, interest at the rate of five per centum (5%) per annum will be awarded from the date of judgment until paid. All costs shall be taxed against the defendants.

In summary, pursuant to Rule 58, F.R.Civ.P., the Clerk is directed to prepare, sign and enter a judgment in favor of plaintiff, Urbain Dardar, and against defendants in the amount of $46,424, together with five per centum (5%) interest per annum from the date of judgment until paid, and for all costs of this action.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1624
Summary Calendar*

URBAIN DARDAR,
Plaintiff-Appellee,

versus

LOUISIANA STATE DEPARTMENT OF HIGHWAYS and HOUSTON FIRE & CASUALTY INSURANCE CO.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

(August 11, 1971)

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: Appealing from an adverse judgment below in an action tried without a jury under the Jones Act, Title 46, U.S.C., Section 688, and under general maritime law, holding them responsible in damages to the extent of $46,424.00 for negligence and for

*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

unseaworthiness of a car-ferry boat operated temporarily[1] across Goose Bayou, near LaFitte, Louisiana, for injuries received February 25, 1968, by the plaintiff-appellee, Dardar, asserted to be serving as a seaman aboard said ferry, the appellants, Louisiana State Department of Highways and its liability insurer, Houston Fire and Casualty Insurance Company attack the judgment appealed from by three claims of asserted error:

(1) whether the car-shuttle ferry, permanently anchored as it was to the bayou bank, was in navigation, and hence within the court's admiralty jurisdiction, which we are urged to answer "No";

(2) whether the appellee was a seaman and as such entitled to maintenance and cure, which we are likewise urged to answer "No"; and

(3) whether the trial court erroneously found the Department of Highways negligent and the appellee not contributorily negligent with his negligence being the sole proximate cause of the accident and injury, which it is asserted, we should answer "Yes".

As to the third point raised, and further as to the questions of fact inhering in the first and second points raised, the appellants have, in our judgment, failed to demonstrate that the trial judge's findings of fact are clearly erroneous. F.R.Civ.P., Rule 52(a); *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20.

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[1]During repairs to a nearby bridge.

As to the questions of law raised by the first and second points on appeal, we think that they are refuted, without need of further embellishment by us, by the trial court's carefully detailed and complete findings of fact, conclusions of law and judgment, reported at 322 F.Supp. 1115.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX "C"

U. S. COURT OF APPEALS
RECEIVED
JUL 2 1971
NEW ORLEANS, LA.

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

URBAIN DARDAR,
Plaintiff-Appellee

versus

LOUISIANA STATE DEPARTMENT OF HIGHWAYS
and HOUSTON FIRE & CASUALTY INSURANCE CO.,
Defendants-Appellants

NO. 71-1624

PETITION FOR REHEARING

NOW INTO COURT, comes Louisiana State Department of Highways, to present this petition for rehearing of the above and entitled and numbered cause and in support thereof, respectfully shows:

1

That on August 11, 1971 the United States Court of Appeals for the Fifth Circuit affirmed a judgment of the United States District Court in the above entitled matter.

2

That judgment is diametrically opposed to the Judgment rendered by the Fifth Circuit Court of Appeals in "Cookmeyer vs-Louisiana Department of Highways" (5th Circuit 1970) 433 Fed. (2d) 386.

3

That the car-ferry boat operated temporarily across Goose Bayou near Lafitte, Louisiana in the above entitled matter was permanently anchored to the banks of each side of the Bayou to provide the movement of vehicular from one side of the land to the opposite side of the land as continuation of a Louisiana Highway.

That the ferry had no other purpose than to carry the vehicular traffic from Louisiana Highway No. 45 on the Barataria side of the Bayou to the Lafitte side of the Bayou while the bridge

in this area was under construction.

5

That the pontoon bridge in the Cookmeyer case and the car-ferry boat permanently fixed to the shores in the above case are similar in all of the following instances:

1) The pontoon bridge in the Cookmeyer case and the ferry in this case were stationary to land.

2) The pontoon bridge in the Cookmeyer case and the ferry in this case floated on the water.

3) The pontoon bridge in the Cookmeyer case and the ferry in this case carried vehicular traffic across the water connecting a Louisiana Highway.

4) The pontoon bridge in the Cookmeyer case, and the ferry in this case were operated strictly for the purpose of carrying vehicular traffic on a Louisiana highway from shore to shore.

5) The pontoon bridge in the Cookmeyer case and the ferry in connection with this case were an extension and continuation of a Louisiana highway.

6

The purpose of the ferry operating on the stationary cable was to continue the Louisiana highway just as the pontoon bridge floating in the water in the Cookmeyer case.

7

The decision of the Fifth Circuit, dated August 11, 1971 appears to be opposite the decision of the United States Supreme Court in Rodrigue v. Aetna Casualty (1969) 89 Sup. Ct. 1835.

8

In the Cookmeyer case, a petition for writ of review was filed by Cookmeyer to the United States Supreme Court from the decision of the Fifth Circuit in No. 29546; the United States Supreme Court denied the writ of review and from this writ Cookmeyer applied for a rehearing based on the fact that Judge

Cassibry of the United States District Court of the Eastern District of Louisiana in Civil Action No. 70-174 in the case of Dardar versus Louisiana State Department of Highways (unreported at the time of the application for rehearing) was decided differently from the Cookmeyer decision; the United States Supreme Court refused the application for rehearing based on the Dardar decision.

9

It was the contention in the petition for rehearing in the Cookmeyer case (a copy of which is annexed to this application for rehearing) that very little difference existed between the vessel employed by the Louisiana Department of Highways in the Dardar case, namely a car-ferry boat operated on a stationary cable and by a pontoon floating on the water. It was argued in the petition for rehearing in the Cookmeyer case that both were vessels navigating upon the surface of navigable bodies of water and that while in the Dardar case they were anchored on a steel cable, in the Cookmeyer case they were anchored on a pivot arm.

10

Counsel for Cookmeyer in the application for rehearing argued that the District Court in the Dardar case decided that the ferry was a vessel entitled to the jurisdiction of the Jones Act and therefore, the Cookmeyer should receive the same application; the Supreme Court refused the application for rehearing as well as the petition to review the Cookmeyer decision of the Fifth Circuit Court of Appeals.

11

What distinction could the District Court possibly have made between a bridge, consisting of five pontoons floating across the water of the Mississippi River Gulf outlet (as in the Cook-

meyer case) and a ferry moving across the water on a cable made stationary to each sides of the bank (Dardar case); in each instance the pontoon bridge as well as the ferry operating on the statipnary cable carried the vehicular traffic from the highway on one side of the Bayou to the opposite side of the waterway.

WHEREFORE, Louisiana Department of Highways prays that this Court grant a rehearing in this matter to consider the serious conflicts between the Cookmeyer case and the Dardar case.

Petitioner further prays that this Court allow oral argument on the rehearing.

Respectfully submitted,

STATE OF LOUISIANA, DEPARTMENT OF HIGHWAYS

PHILIP K. JONES
NORMAN L. SISSON
JESSE S. GUILLOT

BY: Jesse S. Guillot
JESSE S. GUILLOT
Attorney of Record on Appeal
for the Louisiana Department
of Highways
838 Gravier Street
New Orleans, La. 70112
PHONE: 522-7296

CERTIFICATE

I certify that the above and foregoing petition for rehearing is presented in good faith and not for delay.

This, the 23rd day of August, 1971 at New Orleans, Louisiana.

Jesse S. Guillot
JESSE S. GUILLOT

PROOF OF SERVICE

STATE OF LOUISIANA:

PARISH OF ORLEANS:

BEFORE ME, the undersigned authority personally came and appeared:

JESSE S. GUILLOT

who declared after being duly sworn that he is the attorney of record for the Department of Highways, State of Louisiana, that he hereby certifies that on this date he served a copy of the foregoing petition for rehearing on Louis R. Marbige, attorney for Urbain Dardar by mailing same in the U.S. mail at his address, 1360 Saratoga Building, 212 Loyola Avenue, New Orleans, Louisiana and by serving a copy on Randall L. Vick, attorney at Law, 813 American Bank Building, New Orleans, Louisiana and William L. Cahill, III, National Bank of Commerce Bldg., New Orleans, Louisiana, this 21rd day of August, 1971 at New Orleans, Louisiana.

Jesse S. Guillot.
JESSE S. GUILLOT

SWORN TO AND SUBSCRIBED BEFORE ME, NOTARY, THIS, THE 21rd DAY OF AUGUST, 1971.

NOTARY PUBLIC

APPENDIX "D"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1624

URBAIN DARDAR,
Plaintiff-Appellee,

versus

LOUISIANA STATE DEPARTMENT OF HIGHWAYS and HOUSTON FIRE & CASUALTY INSURANCE CO.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

(September 10, 1971)

ON PETITION FOR REHEARING

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.[1]

[1] In support of their petition for rehearing, the appellants rely heavily upon the decision of this Court in Cookmeyer v. Louisiana Department of Highways, 5 Cir., 1970, 433 F. 2d 386. Cook-

---

meyer, supra, was an action by a motorcyclist for injuries sustained when he fell from his vehicle on a pontoon bridge operated as part of Louisiana Highway 47 at the Parris Road crossing of the Mississippi Gulf Outlet and the Intercoastal Canal. This Court affirmed the district court's finding that the bridge was not a vessel (309 F. Supp. 881), thereby taking the action outside the district court's admiralty jurisdiction. In the case presently at bar, the ferry periodically traversed a navigable waterway in the process of transporting cars. The mere fact that the ferry was connected to a cable which was attached to structures on both banks of the waterway does not convert the ferry from a vessel into an extension of the land.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

U. S. COURT OF APPS.
FILED
NOV 2 1971
EDWARD W. WADSWORTH
CLERK

NO. 71-1624

URBAIN DARDAR,

Plaintiff-Appellee,

versus

LOUISIANA STATE DEPARTMENT OF HIGHWAYS
and HOUSTON FIRE & CASUALTY INSURANCE CO.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before MORGAN, COLEMAN and SIMPSON, Circuit Judges.

ON CONSIDERATION OF THE MOTION of appellants for recall and stay of judgment issued as mandate in the above numbered and entitled cause, pending an application for a writ of certiorari to the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate, be recalled and stayed to and including November 15, 1971, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

APPENDIX "EE"

Duran and Guillot

838 Gravier Street
New Orleans, La. 70112
522-7296

Attorneys at Law
Notaries Public

November 11, 1971

Clerk,
United States Court of Appeals
Fifth Circuit
Royal & Conti Streets
New Orleans, Louisiana

RE: No. 71-1624
Urbain Dardar v.
La. State, Dept. of Hwys., et al
Our File: 3811

Dear Sir:

I have delivered my Petition of Certiorari to A B Letter Service for printing. The Order of Court in the above matter recalled and stayed the proceedings to November 15, 1971. The printer has advised me that he will need more time to complete same.

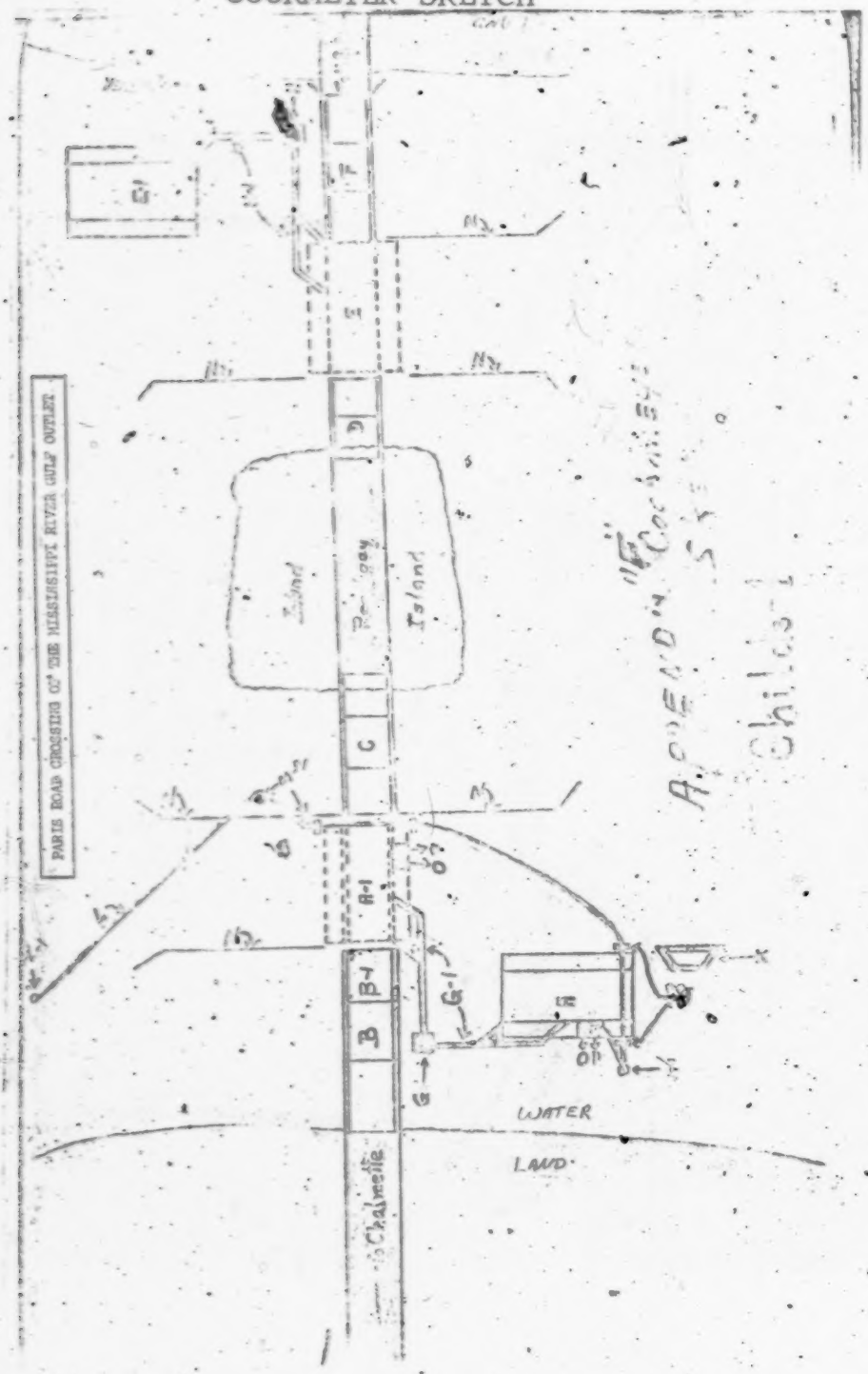
Enclosed is a Motion for An Extension of the stay order which I would appreciate your presenting to the Court if you are unable to grant me the extension.

Very truly yours,

JESSE S. GUILLOT

JSG:pc

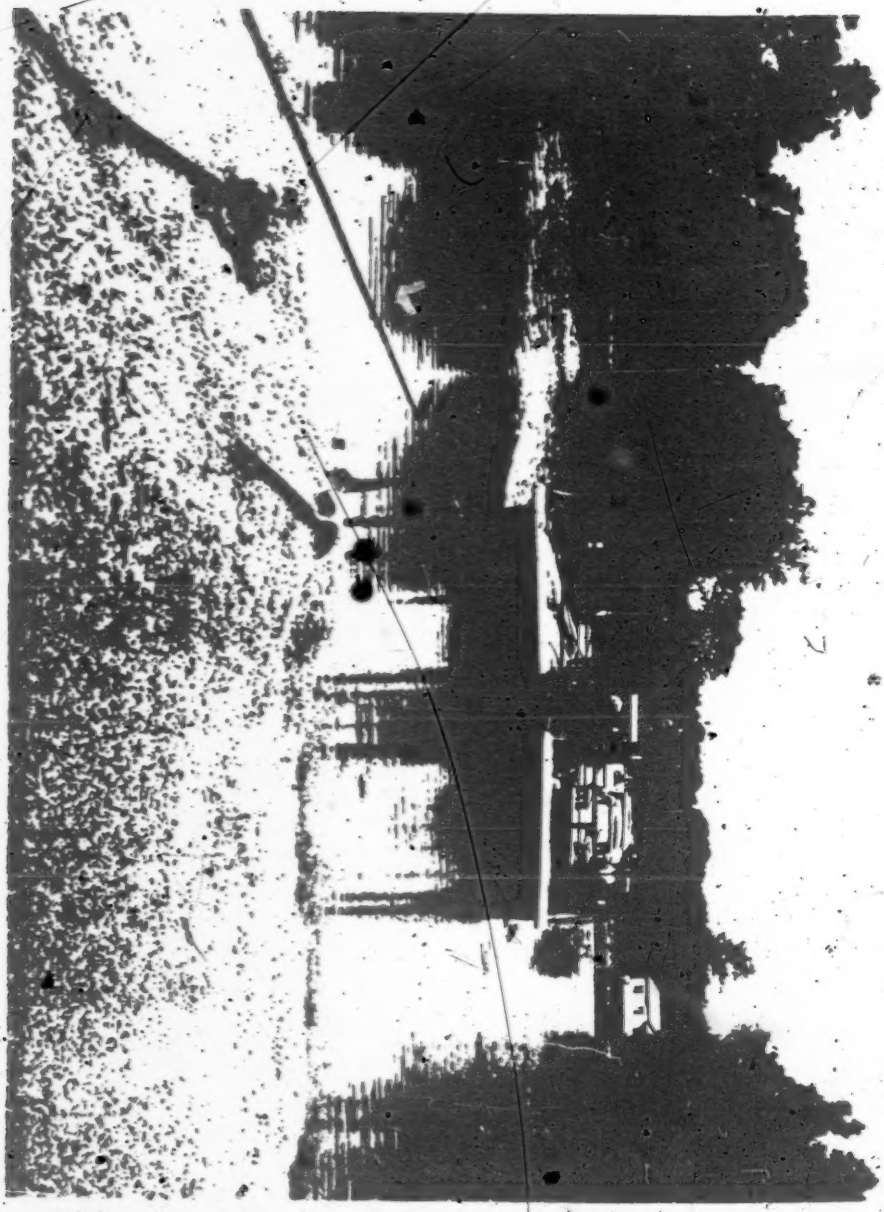
APPENDIX "F"
COOKMEYER SKETCH



APPENDIX "G & H"

APPENDIX "I"

APPENDIX "J"



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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-694

LOUISIANA STATE DEPARTMENT OF HIGHWAYS,

Appellant-Petitioner

Versus

URBAIN DARDAR, ET AL,

Appellee-Respondent

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 71-694

LOUISIANA STATE DEPARTMENT OF HIGHWAYS

versus

URBAIN DARDAR, ET AL.

PETITION FOR REHEARING ON DENIAL
OF WRIT OF CERTIORARI

The petition of the Louisiana State Department of Highways, appellant-petitioner in the above entitled matter respectfully represents:

1.

That the refusal to grant a writ to review No. 71-1624 Urbain Dardar, vs. Louisiana Department of Highways, of the United States Court of Appeal for the Fifth Circuit should be reconsidered for the following reasons to-wit:

2.

That the decision by the Fifth Circuit

Court of Appeal in No. 71-1624, Urbain Dardar vs. Louisiana Department of Highways, is in conflict with an opinion of the Fifth Circuit Court of Appeals in Cookmeyer vs. Louisiana Department of Highways (5th Cir. 1970) 433 Fed. (2d) 386, is in conflict with U. S. vs. Puget Sound Navigation Co. 24F. Sup. 431; Pugent Sound Co. vs. U. S. 107 F (2d) 73, is in conflict with Rodrigues vs. Aetna Casualty (1969) 89 Sup. Ct. 1835; and is in conflict with a decision of the Fifth Circuit Court of Appeals No. 71-2225, entitled Peytavin vs. Government Employees Insurance Co. decided January 7, 1972, (copy annexed to this application for rehearing).

3.

That in the Cookmeyer decision the injury occurred on one of 5 pontoons which floated across a body of water connected to land on each side of the water with a stationary cable, and the Fifth Circuit concluded admiralty jurisdiction did not apply, but in the Dardar decision the accident occurred on a landing approach of a ferry which was connected to land on each side of the water with a stationary cable, and the Fifth Circuit concluded that admiralty jurisdiction did apply.

4.

That the ferry operated in the Dardar case on a stationary cable was merely a substitute for a bridge, and it's use was the same as a bridge, and like a bridge it was created for use and convenience of the travelling public as a link in the State highway system; that a ferry or pontoon connecting a State Highway is a continuation of the land and accidents on them or on their approaches should not be considered within admiralty

jurisdiction. United States vs. Puget Sound Navigation Co. 24 F. 431; Puget Sound Co. vs. U. S. 107 F (2d) 73, that accidents on a ferry floating across a body of water on a stationary cable connecting a State highway on one side of the water to the other as in the Dardar case should not be covered by admiralty jurisdiction.

5.

That the conclusion reached in the Dardar case conflicts with the rational of the Rodrigues vs. Aetna Casualty & Surety Co. where the Supreme Court of the United States acknowledged that workmen on an artificial island (rigs) are closely tied to the adjacent state, to which they often commute and on which their families live, unlike transitory seamen; and, so it would appear the same in the Dardar case where the injury occurred on a landing approach of a ferry which floats across the water or a stationary cable, (a ferry which connects a highway on one side of the bayou to the other side).

6.

That in the Peytavin decision the injury occurred on the approach to the ferry landing and the Fifth Circuit concluded admiralty jurisdiction does not apply, but in the Dardar case, (now on application for Writ of Certiorari) where the accident also occurred on the landing approach to a ferry operated on a stationary cable, the Fifth Circuit allowed recovery under admiralty jurisdiction.

7.

The cases cited herein permit confusing and conflicting results of accidents on

landing approaches to a ferry and pontoons which connect State highways by means of a stationary cable; that the Dardar case appears to have none of the requirements of law to allow admiralty jurisdiction to apply as concluded by the Fifth Circuit Court of Appeals.

8.

That the Court should reconsider whether the refusal to allow admiralty jurisdiction in the Cookmeyer case, in the Peytavin case, in the Rodrigues case and in the Puget Sound cases will be controlling, or whether the finding of the Fifth Circuit in the Dardar case allowing admiralty jurisdiction is controlling where accidents occur on landing approaches to ferry and pontoons connecting State highways.

WHEREFORE, the Louisiana Department of Highways prays that this court grant a rehearing and recall it's decision to refuse to grant the writ of review of the decision of the Fifth Circuit Court of Appeals in NO. 71-1624, Urbain Dardar vs. Louisiana Department of Highways.

Respectfully submitted:

LOUISIANA STATE DEPARTMENT
OF HIGHWAYS

PHILIP K. JONES
NORMAN L. SISSON
BEN C. NORGRESS
JESSE S. GUILLOT

BY _____
JESSE S. GUILLOT,
Trial Attorney

PROOF OF SERVICE

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

JESSE S. GUILLOT

who declared unto me, Notary, that he is an attorney for the State of Louisiana, Department of Highways, that he hereby certifies that on this date he has served a copy of the foregoing petition to review a decision of the Supreme Court of the United States to refuse to grant a writ, on Louis B. Merhige, attorney for plaintiff, Urbain Dardar, by mailing same in the U. S. Mail, postage prepaid to his office at 1360 Saratoga Building, 212 Loyola Avenue, New Orleans, Louisiana and to the Clerk of the Fifth Circuit Court of Appeals, Royal and Conti Streets, New Orleans, Louisiana, on this, the 14th day of March, 1972, at New Orleans, Louisiana.

JESSE S. GUILLOT,
Trial Attorney
State of Louisiana, Department of Highways,
838 Gravier Street
New Orleans, Louisiana, 70112

SWORN TO AND SUBSCRIBED BEFORE ME, THIS THE 14TH DAY OF MARCH, 1972

s/Melvin J. Duran
MELVIN J. DURAN, NOTARY PUBLIC

Printed Copies Mailed:

APPENDIX A

PROPERTY OF:
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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2225
Summary Calendar*

JOHN L. PEYTAVIN,
Plaintiff-Appellant,

versus

GOVERNMENT EMPLOYERS INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(January 7, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

GEWIN, Circuit Judge: Unable to demonstrate diversity jurisdiction, this plaintiff-appellant nevertheless seeks to sue in federal court for whiplash injuries sustained in a rear-end car collision by invoking the

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*Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

district court's admiralty jurisdiction under a claim that the defendant's conduct amounted to a maritime tort. In his complaint, John L. Peytavin alleged that he was parked on a floating pontoon at a ferry landing in the Mississippi River waiting in line to obtain a ticket to board the ferry when his car was struck from the rear by a car operated by Mrs. Eva Bourgeois Dufresne. After a hearing on the defendant's motion to dismiss, the court entered an order finding that the floating pontoon on which the accident occurred was an extension of land and dismissing the suit for lack of admiralty jurisdiction. We concur in the court's judgment, although for different reasons, and affirm.[1]

This court is aware that the outer edge of admiralty tort jurisdiction has not been charted with precision and that the seaward boundary has fluctuated, as do all waterlines, subject to the ebb and flow tides of judicial opinion.[2]

Admiralty tort jurisdiction has as its foundation the "strict locality" rule of The Plymouth, 70 U.S. 20, 18 L.Ed. 125 (1866). There the Supreme Court held that admiralty had no jurisdiction of a claim for damages to a wharf by a fire which had started upon a ship

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[1]The district court observed and Peytavin acknowledges that he is presently pursuing his state court remedies arising from this same occurrence.

[2]No attempt is made here to exhaustively catalogue or compare the various factual situations and the conflicting results achieved by the courts which have considered the question over the past 100 years. A sufficient sampling may be obtained by examining 1 Benedict, The Law of American Admiralty, §§ 127-29 (6th ed. A. Knauth 1940); Annot. 7 A.L.R. Fed. 502 at 505-08 (1971).

and then spread to the shore. The Court found that the jurisdiction of admiralty over maritime tort depends upon locality. However in applying this rule the Court focused narrowly on the location where the damages were inflicted:

> [T]he wrong and injury complained of must have been committed wholly upon the high seas of navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within admiralty jurisdiction. 70 U.S. at 35, 18 L.Ed. at 128.

Because the damage had been inflicted upon land, even though from a clearly maritime source, the Court held the claim was not within admiralty jurisdiction.

This "strict locality rule" has been gradually enfeebled by no less than four modifications or exceptions — two of which have served to expand, and two of which have served to contract admiralty jurisdiction.

At least a crevice developed in the staunch wall of "strict liability" when Mr. Justice Holmes wrote the opinion in *The Blackheath*, 195 U.S. 361, 49 L.Ed. 236 (1904). The Court held that a claim for damage caused by a ship to a channel light built on piles driven in Mobile Bay was within the court's admiralty jurisdiction, even though the light was realty and not part of the navigable waters. In distinguishing *The Plymouth* he said:

4. PEYTAVIN v. GOVT. EMP. INS. CO. ET AL.

> (In that case) there was nothing maritime in the nature of the tort for which the vessel was attached. The fact that the fire originated on a vessel gave no character to the result ... Moreover, the damage was done wholly upon the mainland. 195 U.S. at 367, 49 L.Ed. at 238.

This case gave rise to a general exception for damage to fixed navigational aid structures.[3]

In 1948 the 80th Congress radically altered the strict locality rule of *The Plymouth* by adopting the Admiralty Extension Act which directed:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
> 46 U.S.C. § 740.

The effect of this act was to reverse the result reached by the Court in *The Plymouth*.

However, this expansion of admiralty jurisdiction was attended by two doctrines which were applied to constrict the scope of admiralty tort jurisdiction. The first was the "extension of land" doctrine, by which the strict locality requirement that the injury be in-

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[3]The Raithmoor, 241 U.S. 166, 60 L.Ed. 937 (1915). 1 Benedict, supra note 2, § 129.

flicted upon navigable waters was construed to eliminate from maritime jurisdiction injuries sustained on piers, jetties, bridges, or even ramps or railways running into the sea. *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179, 72 L.Ed. 520 (1928).[4] The second constructive doctrine was the requirement made by some courts that in addition to sustaining injury in a maritime location, the tort must have a "maritime connection." For example, courts have denied maritime jurisdiction of claims arising from alleged injuries to a swimmer who dived off a pier into 18 inches of "navigable water." *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967).[5]

With such a plethora of rules to chose from, it is not surprising that courts have varied in their views as to the metaphysics of precisely where an injury was sustained or whether a particular structure was

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[4] *See* Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 at 360, 23 L.Ed.2d 360 at 366 (1969). *See also* Chevron Oil Co. v. Huson, ____ U.S. ____ (Dec. 6, 1971). 1 Benedict, supra note 2, § 128a.

[5] The question of whether something more than location might also be required was apparently raised by the Supreme Court in Atlantic Transport Co. of W. Va. v. Imbrovek, 234 U.S. 52, 58 L.Ed. 1208 (1914) where the Court stated:

> If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. 234 U.S. at 62, 58 L.Ed. at 1213.

See also Watz v. Zapata Off-Shore Co., 431 F.2d 100 (5th Cir. 1970); McGuire v. New York, 192 F. Supp. 566 (S.D. N.Y. 1961).

"an extension of the land."[6] There has also been difficulty in distinguishing between matters going to the jurisdiction and those determining the merits or the applicable law. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 477, 66 L.Ed. 321, 325 (1922).[7] In *Rohde* the Court held that admiralty had *jurisdiction* of a tort committed on a vessel in the process of construction when lying on navigable waters. But the Court held that in the circumstances, where neither Rohde's general employment as a carpenter, nor his activities at the time of the accident had any direct relation to navigation or commerce, the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which would otherwise exist.

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[6] *Compare* T. Smith & Son v. Taylor, 276 U.S. 179, 72 L.Ed. 520 (1928) [longshoreman unloading vessel standing on a stage that rested solely on wharf, struck by cargo sling and knocked into the water — held not within admiralty jurisdiction] *with* Minnie v. Port Huron Terminal Co., 295 U.S. 647, 79 L.Ed. 1631 (1935) [longshoreman unloading vessel standing on the deck of the vessel, struck by cargo sling and knocked onto the wharf — held within admiralty jurisdiction].

> If, when the blow from a swinging crane knocks a longshoreman from the dock into the water, the cause of action arises on the land, it must follow upon the same reasoning, that when he is struck upon the vessel and the blow throws him upon the dock the cause of action arises on the vessel. 295 U.S. at 649, 79 L.Ed. at 1632.

and The Admiral Peoples, 295 U.S. 649, 79 L.Ed. 1633 (1935) [passenger who fell from gang-plank connecting vessel and dock could sue in admiralty because gang-plank was part of the vessel and not the land.]

[7] The persistence of the confusion as to the relative roles of state and federal law on the seaward side of the pier has been most recently recognized in Victory Carriers, Inc. v. Law, ____ U.S. ____, ____ L.Ed.2d ____ (No. 70-54, December 13, 1971).

Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential. 257 U.S. at 477, 66 L.Ed. at 325.

However in *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 79 L.Ed. 1631 (1935) where a longshoreman was injured by a cargo sling while standing on the deck of a vessel the court held that admiralty had jurisdiction of the claim and because the employee was injured upon navigable waters while engaged in a maritime service, the claim was to be governed by maritime law. 295 U.S. at 648-49, 79 L.Ed. at 1632.

More recently in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L.Ed.2d 360 (1969), the Supreme Court held that the Death on the High Seas Act did not apply to accidents occurring on artificial island drilling rigs located on the outer Continental Shelf off the Louisiana coast. The Court held that these islands were instead governed by the Outer Continental Shelf Lands Act[8] which provided that state law remedies which are not inconsistent with other federal law should be applied. In concluding that the Seas Act should not apply to prevent application of the state law remedies, the court noted that under traditional maritime law, there would be no admiralty jurisdiction because the artificial islands would be considered ex-

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[8] 43 U.S.C. § 1331, et. seq.

tensions of land, even though surrounded by navigable waters.

> The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers ... In these circumstances, the Seas Act — which provides an action in admiralty — clearly would not apply under conventional admiralty principles and, since the Lands Act provides an alternative federal remedy through adopted state law, there is no reason to assume that Congress intended to extend those principles to create an admiralty remedy here. 395 U.S. at 360-61, 23 L.Ed.2d at 367.

Attempts to apply these traditional principles of admiralty jurisdiction to the present case illustrate the difficulty presented by the present maze rules. The essential facts are undisputed. Peytavin's verified complaint alleges that the Dufresne vehicle proceeded down the ferry ramp and the impact with the plaintiff's car occurred on the east bank Lutcher ferry pontoon. The floating pontoon was used for loading and unloading the ferry; it was securely fastened to the shore by means of two cables.*

*The district court asserted that at oral argument it was undisputed that at the time of the accident the pontoon was not floating free; the cables, however, could be loosened or tightened to adjust to the rise and fall of the river.

The district court concluded that the pontoon was an extension of land because it was not a vessel and it was secured to the shore and functioning as a dock or road-way. The court relied on *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 70 L.Ed. 805 (1926) [holding a wharfboat used to transfer freight between steamboats and land, and secured to the shore by four or five cables was not a vessel for purposes of limitation of liability.] and on the Court's earlier opinion in *Cookmeyer v. Louisiana Dept. of Highways*, 309 F.Supp. 881 (E.D. La. 1970), *aff'd per curiam* 433 F.2d 386 (5th Cir. 1970) [holding a motorcycle accident on a bridge not to be within admiralty jurisdiction]. The court in the instant case indicated that it was significant that the floating pontoon performed no function that might not have been performed as well by an appropriate structure on the land. The court found "little difference between this ferry pontoon and piers or wharves extending over navigable waters which are designed and used for providing access to vessels afloat for people and land based vehicles and equipment.".

While we agree with the district court that this automobile accident is not subject to admiralty jurisdiction, we do not think this holding is properly reached simply by categorizing a floating pontoon held in place by two cables as an "extension of land." Certainly the performance of the pontoon tends to make it a "functional" extension of land. But the common characteristics of the "extension of land" cases have been that the structures involved did not float on the water

and were in some manner firmly and permanently fastened to the land.[10] *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1965), cited by the court, held that a ramp used for launching small boats, upon which a man fell while in the water, was an extension of the land. The court noted that no portion of the ramp was afloat, for the underwater portion of the launching ramp was securely fastened to the bottom. Stating the rule, the court said:

> To come within the land extension rule, of course, the structure must be *firmly attached to the land.* A vessel moored to a dock does not become an extension of the land *nor do other structures secured to the shore by cables, or other temporary means.* 340 F.2d at 911. (emphasis added)

It would seem to stretch the analysis almost to the point of distortion to indicate that because the pontoon here performed no function that could not have been performed as well by a structure firmly and fixedly

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[10] E.g. piers, bridges and wharves. *See* Nacirema Operating Co. v. Johnson, 396 U.S. 212, 215, 24 L.Ed.2d 371, 375 n.5, 6 (1969); Evans v. Louisiana Dept. of Highways, 430 F.2d 1280 (5th Cir. 1970). Perhaps the closest case for holding this floating pontoon to be an extension of land is the district court's earlier decision in Cookmeyer v. Louisiana Dept. of Highways, 309 F. Supp. 881 (E.D. La. 1970), *aff'd per curiam*, 433 F.2d 386 (5th Cir. 1970). It was there held that a pontoon bridge assembly on which a motorcycle accident occurred was an extension of land. But the court noted the only portions of the bridge which were not firmly attached to the shore were two barges attached to one of two clusters of pilings by a solidly connected steel pivot arm. These barges containing a portion of the bridge roadway, could be pulled into and out of the channel around the fixed pivot point by two cables.

attached to the land, that the floating pontoon is therefore an "extension of the land." For that matter, the entire ferry boat operation across the Mississippi River could have been performed as well by a bridge spanning from one shore to the other. But merely because one could choose to take the bridge instead of the ferry would not deprive the court of admiralty jurisdiction if the ferry sank in the middle of the river.

Having thus rejected the district court's use of the "extension of land" doctrine as the exclusive basis for lack of admiralty jurisdiction in this case, this court must grapple with the other jurisdictional doctrines. Application of the "strict locality" test fails to provide any clear guidance because the rule is only as precise as the court's ability to determine "the location." It does appear here that the injury was sustained on the pontoon, and hence in navigable waters. It is not clear that the wrong, i.e., the negligent operation of the Dufresne automobile, occurred on navigable waters.[11] Certainly no claim of admiralty jurisdiction has been, or could be, made on the basis that this pontoon was a navigational aid. *The Blacksmith*, *supra*. Finally, application of the "location plus maritime connection" test of *Chapman v. City of Grosse Pointe Farms*,[12]

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[11]The complaint alleges, in part, that the defendant failed to have her vehicle under control, failed to maintain a proper lookout, failed to exercise due care, failed to stop, and failed to turn aside to avoid the plaintiff's vehicle. Some of the allegedly negligent conduct could have occurred on the floating pontoon and some of it could have occurred on the shore as she was approaching the pontoon.

[12]And as advocated in Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex. 1968), and discussed in Watz v. Zapata Off-Shore Co., 431 F.2d 100 (5th Cir. 1970).

supra yields the combined confusion of the strict location test and the question of what is sufficient minimum maritime connection.[13] The circumstances of the injury here do demonstrate some minimum maritime connection. Both parties were engaged in the use of the facilities which are connected with maritime commerce at the time of the accident. But neither the parties, nor the nature or the apparent cause of the accident, nor the injury sustained demonstrates any further connection with maritime activities or interests.

Admiralty jurisdiction in the federal courts was predicated upon the need for a uniform development of the law governing the maritime industries.[14] In view of the metamorphosis which the traditional maritime tort jurisdictional rule has undergone since *The Plymouth* sailed over one hundred years ago and the difficulty in applying its modern-day progeny to the facts of this case, we find it appropriate to note that in gen-

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[13] Those cases which have demanded some maritime connection . . . have demanded only a minimum. They have refused to assume admiralty jurisdiction in cases involving swimmers, a person falling off a dock, a crane breaking and dropping a lift truck into the water. f.n. 12, Watz, 431 F.2d at 111.

See also Davis v. City of Jacksonville Beach, Fla., 251 F. Supp. 327 (M.D. Fla. 1965) finding location and sufficient maritime connection where a swimmer was struck by a surf board.

> . . . [A] surfboard, by its very nature, operates almost exclusively on the high seas and navigable waters, and, just like a small canoe or raft, potentially can interfere with trade and commerce. For this reason, admiralty should develop the rules of liability relating to a surfboard's operation. 251 F. Supp. at 328.

[14] 1 Benedict, supra note 2, § 1 and cases cited n.2 at p.1. See also the scholarly discussion of Judge Noel in Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex. 1968).

eral the courts have denied maritime tort jurisdiction where the circumstances of a suit fail to demonstrate any substantial connection with maritime activities or interests.

Peytavin urges in support of admiralty jurisdiction this court's earlier decision in *Byrd v. Napolean Ave. Ferry*, 227 F.2d 958 (5th Cir. 1955) *aff'd per curiam*, 125 F. Supp. 573 ED La. 1954). A comparison of the differences between the two cases illustrates the absence of substantial connection with maritime activities or interests in the present suit. In *Byrd* the plaintiff sued the operator of a similar Mississippi ferry for personal injuries and for the wrongful death of her husband when their car careened off of the ferry, across a similar floating pontoon barge and into the river. The court acting within its admiralty jurisdiction held that general maritime law would apply to the plaintiff's injuries, but that the claim for wrongful death would be governed by state law.

In the first instance the activities of the parties in *Byrd* were more substantially connected with maritime activities than those of the parties here. The plaintiff was a passenger aboard a commercial ferry boat. The defendant was the operator of a commercial ferry boat. Here both parties were passengers waiting to board the ferry. Moreover, there was a more substantial connection with maritime activities in the relationship between the parties in *Byrd*, i.e., passenger — ferry operator, than here, i.e., passenger — passenger. In *Byrd* the causes of the injury, the negligence of the ferry operator and the unseaworthiness of the ves-

sel, were more substantially connected to maritime activities than the alleged failure of Mrs. Dufresne to keep her automobile under control and maintain a proper lookout. The pontoon barge location where the injuries were sustained is approximately the same in both cases, although in *Byrd* the sequence of causal events started on board the ferry and ended in the Mississippi whereas the events here began on the riverbank. Finally the nature of the damages sustained, in addition to being more severe, were also more closely connected with maritime activities in *Byrd*. In the present case the plaintiff suffered a whiplash neck and back injury in a rear-end car collision. In *Byrd* the plaintiff suffered, in addition to a back injury, "the horror of being pulled, drowning, out of the river only to learn that her husband had not been saved."

This court considers these factors to offer some practical guidance in determining whether a claim for tort damages is properly within the jurisdiction of admiralty. Having examined the facts and circumstances of Peytavin's claim we find that it lacks substantial connection with maritime activities or interests. The plaintiff has failed to meet the burden imposed by F.R.Civ. P. 8(a) (1) to affirmatively show that the court has jurisdiction of his claim. Indeed the allegations of this sworn complaint negate the court's jurisdiction. Accordingly, the judgment of the district court finding that this claim is not within the jurisdiction of admiralty is AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

E. Robert Seaver
Clerk of the Court

FEB 22 1972

JESSE S. Guillot, Esq.
Norman L. Sisson, Esq.
838 Gravier St.
New Orleans, La. 70112

RE: LOUISIANA STATE DEPT OF HIGHWAYS v. DARDAR, ET AL., No. 71-694,

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

E. Robert Seaver, Clerk
By

(signature illegible)

Assistant Clerk

Louis B. Merhige, Esq.
1360 Saratoga Bldg.
212 Loyola Avenue
New Orleans, La.

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES

LOUISIANA STATE DEPARTMENT OF HIGHWAYS Appellant-Petitioner	*	NO: 71-694
versus	*	
URBAIN DARDAR, ET AL Appellee-Respondent	*	

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE

On motion of the Louisiana Department of Highways, appellant-petitioner in the above entitled matter and on suggesting to the Court that on February 22, 1972 this Court denied that Louisiana Department of Highways a Writ of Certiorari to review No. 71-1624 Dardar vs. Department of Highways rendered by the Fifth Circuit Court of Appeals; that a petition for rehearing has been prepared and delivered to A.B. Letter Service to be printed; that an extension of time for filing the petition for rehearing until March 29, 1972 to allow completion of the printing is necessary.

IT IS ORDERED that the Louisiana Department of Highways be granted additional time for filing a petition for rehearing to March 29, 1972 in order to allow the printer to

complete the printing of the petition.

_____
J U D G E

s/Jesse S. Guillot
JESSE S. GUILLOT
Trial Attorney for
State of Louisiana
Department of Highways
838 Gravier Street
New Orleans, Louisiana, 70112
Phone: 522-7296